91-989

No._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GREGORY CRYTES; JOHN WOLFIN;

JIMMY BAILEY ROGERS; CLAUDE SKILES;

JOSEPH N. WHITFIELD, *Petitioners*,

v.

DR. C. KEITH SCHAFER, DIRECTOR OF MENTAL HEALTH,

STATE OF MISSOURI, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID O. FISCHER
FISCHER & DOLAN, P. C.
818 Lafayette Ave.
St. Louis, MO 63104
(314) 231-0777
Counsel of Record

D. ERIC SOWERS
635 Maryville Centre Dr.
Suite 120
St. Louis, MO 63141
(314) 469-7800
Counsel for Petitioners

December, 1991

QUESTIONS PRESENTED

42 U.S.C. § 407(a) prohibits assignment, attachment, or other legal process to reach a beneficiary's Social Security benefits. The Eighth Circuit has held that it is permissible, nonetheless, for the State Director of Mental Health to obtain appointment as Representative Payee for state mental health patients, then reimburse the state for costs of care and treatment, pursuant to state statute, and without the consent of said patients.

The questions presented are:

1. Whether a state, acting as Social Security Representative Payee for mental health patients, may reimburse itself for claimed costs of care and treatment without violating the provisions of 42 U.S.C. § 407(a).

2. Whether a state, acting as Social Security Representative Payee for mental health patients, may place itself in the position of a preferred creditor by reimbursing itself for claimed costs of care and treatment of such beneficiaries, as to which the Courts of Appeal are in conflict.

3. Whether a state, acting as Social Security Representative Payee for mental health patients, violates the Due Process protection of the 5th and 14th Amendments to the United States Constitution by

reimbursing itself for claimed costs of care and treatment from benefits received on behalf of such patients without providing a mechanism to test the legitimacy and reasonableness of such charges.

4. Whether a state violates the Equal Protection Clause of the United States Constitution by claiming charges for care and treatment of mental health patients based solely upon the individual patient's monthly income, including his Social Security benefits.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Gregory Crytes, John Wolfin, Jimmy Bailey Rogers, Claude Skiles, Joseph N. Whitfield and the Respondent Dr. C. Keith Schafer, Director of the Department of Mental Health, State of Missouri. Thomas King and Jeremiah Baker were separate appellants in the court below. The Eighth Circuit reviewed their claims separately due to the fact that they had family members as their appointed representative payees, rather than the Director of the Department of Mental Health as their payee. The court reversed and remanded the District Court's Grant of Summary Judgment with respect to appellants King and Baker; accordingly, they are not named as parties herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners Gregory Crytes, et al, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on August 5, 1991, Rehearing denied September 17, 1991.

OPINIONS BELOW

The Opinion of the United States District Court, Eastern District, Missouri is reported at 743 F. Supp. 677, and is reprinted in the Appendix hereto, p. 1a, *infra*.

The Opinion of the Court of Appeals for the Eighth Circuit is reported at 940 F.2d 1182, and is reprinted in the Appendix hereto, p. 13a, *infra*.

The order of the Court of Appeals for the Eighth Circuit, denying rehearing, has not been reported. It is reprinted in the appendix hereto, p. 22a, *infra*.

JURISDICTION

Invoking Federal Jurisdiction under 28 U.S.C. § 1331, the petitioners brought suit in the Eastern District of Missouri. On August 3, 1990, the Eastern District denied petitioners' Motion for Summary Judgment and for other relief of an injunctive nature. See p. 12a, *infra*.

On petitioners' Appeal, the Eight Circuit, on August 5, 1991, entered a Judgment and Opinion reversing the Eastern District's orders as to appellants King and Baker and affirming the Judgment as to the petitioners. See p. 21a, *infra*.

The Eighth Circuit denied a timely petition for rehearing on September 17, 1991. See p. 22a, *infra*.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 407. Assignment; Amendment of Section

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or the right or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provisions of law, enacted before, on or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent it does so by express reference to this section.

STATEMENT OF THE CASE

Petitioners all are mental patients at facilities operated by the Missouri Department of Mental Health, having been found not guilty of criminal offenses by reason of mental disease or defect. Likewise, all receive Social Security disability benefits.

Missouri statutes provide that persons receiving care at such facilities are financially responsible to the state for the costs of care and treatment. Accordingly, the state has sought and received appointment as Representative Payee for each petitioner by the Social Security Administration. When the check is received the state allows a small amount of spending money to the patient, then reimburses itself for costs, against the wishes of the patients. In cases where an outsider, such as a family member, was appointed Representative Payee, it was the practice of the state to threaten that person with legal action, including seizure of state tax refunds, unless that person paid over the patient's Social Security benefits to the state.

The calculation of the state's costs is not based upon services rendered - instead, these costs are calculated to precisely equal the amount of the patients' monthly income, including Social Security benefits. In the case of the petitioners, their benefits are their sole source of income.

Petitioners sued the Director of Mental Health under 42 U.S.C. § 1983, seeking prospective injunctive relief against the state's practice of seizure; the case was submitted to the District Court for the Eastern District of Missouri on stipulated facts and the District Court found in favor of the state on all issues.

On appeal, a divided Eighth Circuit reversed as to King and Baker, holding that the state cannot threaten to do what it is not empowered to do in fact, but affirmed as to petitioners. The dissent would have reversed in favor of all appellants, asserting that the facts were controlled by the U.S. Supreme Court's ruling in *Bennett v. Arkansas*, 485 U.S. 395 (1988).

All of the petitioners save King and Baker moved for rehearing, and that motion was denied on September 17, 1991. Petitioners now seek review of the Eighth Circuit decision on Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This case presents issues of current and exceptional importance that should be decided by this court; petitioners submit that (1) in this case the Court of Appeals for the Eighth Circuit has decided federal questions of great importance which this Court has not addressed directly, (2) that the Eighth Circuit decided those questions in a manner directly in conflict with applicable decisions of this Court, and (3) that the Eighth Circuit has decided those questions squarely in opposition to the correct holding of the Ninth Circuit.

1. The Eighth Circuit decision directly conflicts with the substance of this Court's holdings in *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973) and *Bennett v. Arkansas*, 485 U.S. 395 (1988) (per curiam). In those cases, it was made plain by this Court that state governments may not use "legal process" to seize Social Security benefits as reimbursement for services rendered to the recipients. Here, the State of Missouri has applied for and received appointment as Representative Payee for the petitioners, then pocketed the funds paid to it for the petitioners' benefit by the Social Security Administration, claiming that it did not use "legal process" in the act. The state, in other words, seeks to slip the constraints of 42 U.S.C. § 407(a), and the United States Supreme Court's interpretation of that

statute, by simply not allowing due process in its confiscation of funds, in that:

a. The statute embraced by Missouri's Mental Health Department, as justifying this self-help, does not create a mechanism for the state to seize any funds from patients' assets -it merely recites that the patients may be held liable for the payment of costs of care. In other words, the statute only defines the category of persons who may be subject to legal liability for costs of care, standing mute on what legal process the state must follow to obtain compensation from liable persons. Undoubtedly the Missouri legislature intended the state to comport itself with legal process so that the patient at least has the opportunity to test the validity of any charges. The state's practice of self-help, unfortunately, appears to be a time-honored one, as illustrated in the footnote in *State ex rel. Foltz v. Ahr*, 666 S.W.2d 777, 778, n.1 (Mo. App. 1983).

b. Using this self-help mechanism is repugnant to every basic principle of due process. The current practice, endorsed by the Eighth Circuit, allows the state to assess charges not on services rendered but on the patient's assets - including his Social Security benefits - then divert the funds from the patient to itself, without any opportunity for the patient to dispute the amount of the billing, in its

capacity as Representative Payee. If the law proscribes taking Social Security benefits from patients through due process, then the state is entitled to do so by ignoring due process, according to its own argument with the fat and gristle boiled away. This position was summarily dismissed by the Ninth Circuit in *Brinkman v. Rahm*, 878 F.2d 263, 265 (9th Cir. 1989), holding that ". . . the state could not lawfully avoid section 407 by resort to confiscation without benefit of legal process, since such confiscation was a blatant denial of due process of law."

c. The procedures used by the Division of Mental Health to calculate the daily charges assessed against each individual patient violate the equal protection clause of the Constitution. As stated above, the state calculates the monthly income of the individual patient - including the patient's Social Security benefits - and then declares that that amount is precisely the monthly charge to the patient for care. As the monthly income of the patient fluctuates, so does the monthly charge. Under this process those patients receiving Social Security benefits, including petitioners, are being taxed not only for their own care but also a pro rata proportion of the costs of care for those patients who are not qualified for Social Security benefits or any other form of income. The inescapable result of this practice is that Social Security

monies are being appropriated by the state for services rendered to persons who are not the legal beneficiaries of those monies.

2. This is not the sole mischief worked by the state's action; in addition to the damage to the Social Security system and the patients, the state puts itself squarely in the position of a preferred creditor, see: *Philpott*, *supra*, p. 7. In the event that other, pre-existing creditors may seek to obtain reimbursement or compensation from the petitioners, they are unable to do so by virtue of the state's actions. When the state finishes with these Social Security benefits checks, every last cent is gone. Nothing is left for creditors (who are in any event unable to reach the funds because they, unlike the state, cannot obtain appointment as Representative Payees).

3. The Eighth Circuit's opinion in the instant case establishes a senseless distinction between those patients who have outside representative payees and those for whom the state has obtained appointment. The state can no longer threaten outside Representative Payees into signing over the patients' Social Security benefits, but as the majority observes, in many instances the patient has no one who is qualified to serve as Representative Payee, or, alternatively, the state is better qualified. However, since the purpose of these benefits is, in part, to provide for dependents and for rehabilitation when the patient is

released from the hospital, clearly those whose money is being taken are those who are most vulnerable and who most need protection. The Eighth Circuit has created a double standard: those beneficiaries who are fortunate enough to have someone to serve as their Representative Payee can retain their benefits, while those who are less fortunate must forfeit theirs.

4. The state's actions amount to a siphon into the Social Security Fund never contemplated or intended by Congress. Medical cost reimbursement is obtained through Medicaid, and 20 C.F.R. § 416.640(c) forbids payment of other Social Security benefits from a Representative Payee to an institution receiving Medicaid funds, making it more likely than not that these payments by the state to itself for reimbursement of care and treatment are in violation of Federal regulations. While the exhaustion of the Social Security Fund is the subject of current debate across the land, the State of Missouri uses self-help to pocket monies it would never be able to reach through due process, and acting illegally in doing so. The Department of Mental Health cannot, on the one hand, refuse to act in compliance with due process requirements in talking petitioners' Social Security monies, while avoiding injunction by adopting the position that they are not using "legal process" as addressed in *Bennett v. Arkansas*, 485 U.S. 395

(1988). It seems illogical that the Supreme Court intended *Bennett, supra*, to apply only to form and not to substance; in the instant case the State of Missouri is doing sub rosa exactly what the State of Arkansas attempted, and should be abruptly stopped by this Honorable Court.

Accordingly, petitioners respectfully pray this Court to issue its Writ of Certiorari and allow them the opportunity to fully brief the Court in the premises.

Respectfully submitted,

DAVID O. FISCHER
FISCHER & DOLAN, P. C.
818 Lafayette Ave.
St. Louis, MO 63104
(314) 231-0777
Counsel of Record

D. ERIC SOWERS
635 Maryville Centre Dr.
Suite 120
St. Louis, MO 63141
(314) 469-7800
Counsel for Petitioners

December, 1991

APPENDIX

Gregory CRYTES, and Thomas King, John Wolfin, Jeremiah Baker, Jimmy Bailey Rogers, Claude Skiles and Joseph N. Whitfield, Plaintiffs,

v.

Dr. C. Keith SCHAFER, Director of Department of Mental Health, State of Missouri, Defendant.

No. 88-0901 C (5).

United States District Court, E.D. Missouri, E.D.

August 3, 1990

MEMORANDUM

LIMBAUGH, District Judge.

This matter is before the Court on the parties' cross motions for summary judgment. The parties agreed that the issues in this case were strictly issues of law. Therefore, the Court removed this matter from the trial docket, and the matter was submitted to this Court on the pleadings for this Court's determination of the issues.

The seven plaintiffs in this case are patients of the Missouri Department of Mental Health. Each of the plaintiffs was involuntarily committed to the custody of the Director of Mental Health after being

found not guilty by reason of mental disease or defect, of criminal charges. Each of the plaintiffs have been determined to be totally disabled by the Social Security Administration, due to mental illness, and are receiving monthly benefits therefrom. In this action, plaintiffs are challenging the procedures used by the Department of Mental health to secure payment for their care and treatment. The gravamen of their complaint is that the Social Security disability benefits which each of the plaintiffs receives should not be used to pay these charges.

Dr. Keith Schafer has been the Director of the Department of Mental Health, State of Missouri, since July 1986. He is the Chief Executive officer of that Department. Plaintiffs Gregory Crytes, Thomas King, John Wolfin, Jeremiah Baker, Jim Bailey Rogers and Joseph Whitfield are currently hospitalized at St. Louis State Hospital. Plaintiff Claude Skiles was formerly hospitalized at St. Louis State Hospital, but since October 24, 1988 he has resided at Southeast Missouri Mental Health Center in Farmington, Missouri. All plaintiffs are currently receiving services from the Department of Mental Health.

St. Louis Hospital requested that the Social Security Administration select it to serve as representative payee, pursuant to 42 U.S.C. § 405(j), for plaintiffs Crytes, Rogers, Whitfield and Wolfin. St. Louis State Hospital has been authorized to serve in that capacity by

the Missouri legislature, pursuant to § 630.315, RSMo. 1986. The Social Security Administration named the St. Louis State Hospital as representative payee. Southeast Missouri Mental Health Center is currently representative payee for plaintiff Skiles. Plaintiff Thomas King has been adjudicated incompetent, and his sister Dorothy King James has been appointed his guardian. She is also his representative payee for Social Security benefits. Lorraine Harris is representative payee for Jerry F. Baker.

Pursuant to current Social Security Administration guidelines, St. Louis State Hospital allows at least thirty dollars per month for personal spending to each plaintiff for whom it serves as representative payee. Pursuant to St. Louis State Hospital Facility policy, each patient may receive a larger amount for personal spending if his treatment team approves the amount. Each of the plaintiffs have received personal spending money in excess of the thirty dollar monthly minimum. None of the plaintiffs have ever submitted a request for additional personal spending money which has been denied by the treatment team.

The funds received by St. Louis State Hospital as representative payee, which are not allotted to the patient for personal spending as described above, are applied to charges billed by the Department of Mental Health for the patient's care and treatment

pursuant to § 630.210, RSMo. 1986, as provided by 20 C.F.R. § 404.2040(b) (1989).

The plaintiffs and their representative payees are responsible for the charges for their care and treatment provided by the Department of Mental Health, pursuant to Section 630.205 and Section 552.080, RSMo. 1986. The Department of Mental Health determines the daily billing for each of the plaintiffs by calculating the patient's financial resources and income per month (including his Social Security benefits), deducting the amount allowed each patient for personal spending and then dividing that amount by the number of days per month that the patient received services. Each plaintiff's Social Security benefits are used in calculating this daily charge.

The Department of Mental Health has never taken legal action against Dorothy James or Lorraine Harris for payment of the hospital's charges for the care of plaintiffs King or Baker. Moreover, the Department of Mental Health has never filed any legal action or claim in any court against any of the plaintiffs to collect amounts due for care and treatment. Nor has the Department used execution, levy, attachment or garnishment to obtain payment for care and treatment from any of the plaintiffs.

Although their admission to St. Louis State Hospital was the

result of criminal proceedings, the plaintiffs in this case, like all patients of the Department of Mental Health, are liable for the cost of their care and treatment. *State ex rel. Foltz v. Ahr*, 666 S.W.2d 777 (Mo. App. 1983). This is provided by statute at §§ 3 of § 552.080, RSMo. 1986, which states:

> 3. If a person is ordered held or hospitalized by the Director of the Department of Mental Health or in one of the facilities of the Department of Mental Health pursuant to the following provisions, the liability for hospitalization shall be paid by the person, his estate or those responsible for his support in accordance with Chapter 630, RSMo.:
>
> * * * * *
>
> (2). Following acquittal because of lack of responsibility due to mental disease or defect under Section 552.030, and subsequent order of commitment to the Director of the Department of Mental Health under Section 552.040.

In Chapter 630 of the Revised Missouri Statutes of Missouri, the obligation to pay is further defined at Sections 630.205 - 630.220. As provided by § 630.205:

> 1. The person receiving services and the person's estate, spouse, parents, if the person is a minor, and any fiduciary or representative payee holding assets for the person or on the person's behalf are jointly and severally liable for the fees

> for services rendered to the person by a residential facility, day program or specialized service operated or funded by the Department.

Most patients, including all of the plaintiffs are not charged the full costs of their care and treatment. In the case of each of the plaintiffs, the charges are based upon the income they receive through Social Security disability benefits. St. Louis State Hospital calculated these charges by determining the total amount of benefits received in a month; deducting the amount allotted to the patient for personal spending, and then dividing the amount remaining by the number of days which the patient received services in a particular month. The result is a daily charge or "per diem". As provided by § 630.205, this charge is billed to the patient and/or any other individual responsible for his support. In the case of the plaintiffs, their representative payees are billed.

The charges assessed for the plaintiffs' care and treatment are authorized by state law. The plaintiffs argue, however, that federal law, specifically 42 U.S.C. § 407, prohibits the payment of these charges from the funds they receive from the Social Security Administration.

Title 42 U.S.C. § 407 provides:

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or the right or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provisions of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

Thus, according to the plain language of the statute, creditors are prohibited from reaching a debtor's Social Security benefits through the use of a transfer or assignment or through execution, levy, attachment, garnishment or other legal processes.

The issue before this Court is whether defendant has violated Section 42 U.S.C. § 407 by requiring plaintiffs to use their Social Security benefits to pay for their expenses at the mental hospital. Although this issue has not yet been addressed by the Eighth Circuit Court of Appeals, this Court finds from an examination of the law in other circuits that defendant's actions do not violate § 407(a).

The rationale in the Fifth Circuit decision of *Department of*

Health v. Davis, 616 F.2d 828 (5th Cir. 1980) is persuasive. In that case the State of Florida had been taking care of Arthur Grady Glassock, an adjudicated incompetent, in the Florida State Hospital. Over the years, Glassock's guardian in Alabama had accumulated over $40,000 in social security and veterans' benefits. From these accumulated funds, Florida sought reimbursement for Glassock's past care and maintenance. Florida's Department of Health and Rehabilitative Services is authorized under Florida Statute to collect payment for the care of patients in state institutions. The correct construction and application of the Florida Statute with the Social Security exemption set for in § 407 was at issue in the case. *Davis*, 616 F.2d at 829.

The Fifth Circuit Court of Appeals held that the Department of Health was entitled to reimbursement for the care and maintenance of Glassock from the accumulated fund of Social Security benefits. In reaching this decision the Court stated the following:

> The purpose of social security benefits for the disabled is to provide for their care and maintenance. The purpose of the social security exemption is to protect social security beneficiaries from creditors'claims. Enacted as part of the original social security legislation, Pub. L. No. 64-271, § 208, 49 Stat. 622, 625 (1935), this exemption evinces a clear legislative purpose of precluding beneficiaries from diverting their social security payments away from the statute's seminal goal

> of furnishing financial, medical, rehabilitative or other services to needy individuals. 42 U.S.C. § 301. Neither the purpose of the benefits, nor the purpose of the exemption, is accomplished by barring Florida from reimbursement. The federal grants are for the purpose of assuring the beneficiary's care and maintenance, and the state seeks nothing more than to apply them to the reasonable costof Glassock's care. Fees collected by the Department are calculated according to both the cost of care and the patient's ability to pay, thereby permitting the Department to consider both the beneficiary's present and future needs in setting a fee schedule.

Davis, 616 F.2d at 831. The Court concluded that "[s]ince Glassock has the ability to pay, . . . and the funds held by his guardian were received for his care and maintenance, the state's request for reasonable reimbursement [from this fund] is entirely justified." *Davis*, 616 F.2d at 832.

To paraphrase the reasoning of the court in *Davis*, 616 F.2d at 831, Social Security benefits for the disabled or retired are intended to provide those persons with some funds for their financial, medical and rehabilitative needs without fear of ordinary creditor intervention. When the state provides those needs, as in the case of these plaintiffs, it does not violate congressional intent by reimbursing the state from Social Security benefits allocated to plaintiffs. There is nothing in the legislative history of 42 U.S.C. § 407 to suggest a Social Security recipient should have double coverage; that is, the award of Social

Security benefits when a state is already providing the benefits for which Social Security is intended. This is so especially in view of the facts of this case where the State of Missouri is providing these benefits to persons committed to the custody of the Director of Mental Health because they have been found to be not guilty of criminal charges due to mental disease or defect.

In *Fetterusso v. State of New York*, 715 F. Supp. 1272 (S.D.N.Y. 1989), the plaintiffs were involuntary committees to the custody of defendant New York State Office of Mental Health. They complained that their obligation to contribute to the cost of their care and maintenance was in violation of 42 U.S.C. § 407. The Court stated:

In accordance with federal regulations, a representative payee has the responsibility to:

> Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary. 20 C.F.R. § 404.2035(a) (1988). The regulations further define "for the use and benefit of the beneficiary" to include use "for the beneficiary's current maintenance". 20 C.F.R. § 404.2040(a) (1988). If the beneficiary is institutionalized "because of mental or physical incapacity, current maintenance includes the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or

> expenses for personal needs which will improve the beneficiary's conditions while in the institution." 20 C.F.R. § 404.2040(b) (1988).
>
> Thus, the representative payee is not forced by legal process to use Social Security benefits to meet costs assessed under § 43.03(c). Rather, the federal regulations in specifically providing for the application of Social Security benefits to the costs of care for mental incapacity, indicate that "a representative payee has a responsibility, if it is possible to do so, to make such payments." *Woodall v. Bartolino*, 700 F. Supp. 210 (D.N.J. 1985). Such choice by one charged with determining the appropriate use of Social Security benefits does not conflict with the protection of 42 U.S.C. § 407(a).

Based on the foregoing, the Court finds that the Department of Mental Health's actions in using plaintiffs' Social Security as payment for the plaintiffs' care and treatment do not violate 42 U.S.C. § 407(a). This is especially so because defendant has taken absolutely no action in violation of the express language of Section 407(a).

Plaintiffs cite the two Supreme Court decisions, *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973), and *Bennett v. Arkansas*, 485 U.S. 395, 108 S.Ct. 1204, 99 L.Ed.2d 455 (1988), in support of their position that defendant cannot require them to use their Social Security benefits to pay for their care at the hospital. However, in both those cases the governmental agency engaged in some action directly violative of Section 407. Here,

defendant has taken absolutely no action in violation of the plain language of the statute. Defendant has not attached, executed, levied, garnished or engaged in any other legal process in using plaintiffs' social security benefits to reimburse, in effect, the state for their care and maintenance of plaintiffs.

Thus, as defendant has not violated Section 407(a) of Title 42, and because the Court finds that defendant's use of plaintiffs' Social Security benefits is proper, the Court finds that judgment should be entered in favor of defendant, Judgment will be entered accordingly.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-2652EM

THOMAS KING; JOHN WOLFIN; GREGORY CRYTES; JEREMIAH BAKER; JIMMY BAILEY ROGERS; CLAUDE SKILES; JOSEPH N. WHITFIELD,	*	
Appellants,	*	On Appeal from the United States District Court for the Eastern District of Missouri
v.	*	
KEITH SCHAFER, DIRECTOR OF MENTAL HEALTH, STATE OF MISSOURI,	*	
Appellee.	*	

Submitted: April 10, 1991

Filed: August 5, 1991

Before ARNOLD and BEAM, Circuit Judges, and HANSON,* Senior District Judge.

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*The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

ARNOLD, Circuit Judge.

Seven patients involuntarily committed to the care and custody of the Missouri Department of Mental Health appeal the District Court's order granting summary judgment to the Director of Mental Health. In dispute is whether the Department's practice os using the patients' social security benefits to pay the costs of their care and treatment violates federal law. We affirm in part and reverse in part.

The parties stipulated to the following facts. Each of the plaintiffs was involuntarily committed to the care and custody of the Director of Mental Health after being found not guilty of crimes by reason of "mental disease or defect." Mo. Rev. Stat. § 552.040. Each has been determined to be disabled by the Social Security Administration due to mental illness, and each receives monthly social security benefits. None of the plaintiffs directly receives these benefits. Pursuant to 42 U.S.C. § 405(j) and 20 C.F.R. § 404.2010 (1991), representative payees receive plaintiffs' benefits on their behalf. Missouri state mental-health institutions serve as the representative payees for five of the plaintiffs – Crytes, Rogers, Skiles, Whitfield, and Wolfin. Family members act as the representative payees for plaintiffs King and Baker.

Under Missouri law, the plaintiffs and their representative payees are jointly and severally liable for the costs of the plaintiffs' care and treatment. See Mo. Rev. Stat. § 552.080.3, 630.205.1. Accordingly, the state institutions acting as the representative payees for five of the plaintiffs apply the funds they receive on plaintiffs' behalf to monthly charges billed by the Department for care and treatment. Pursuant to Social Security Administration guidelines, thirty dollars of each patient's monthly benefits is available to personal expenses. If the patients want more than thirty dollars in one month for expenses they can request an additional amount from their benefits. Such requests have never been denied.

The other two representative payees are billed by the Department of Mental Health for their relatives' care. The Department has sent these payees letters advising them that if they ever refuse to pay the charges, the Department will bring legal action against them and seize their state income tax refunds to satisfy the debt. Both payees have paid the Department some benefits since receiving the letters. The Department has not, however, brought any legal action against the payees to recover payment for care and treatment provided by it. Counsel for the Department told us at the oral argument that his client never had any real intention to bring such an action.

The plaintiffs brought this action to enjoin the Department's practice of using their social security benefits to pay for their care and treatment.[1] They contend this practice violates a provision of the Social Security Act, 42 U.S.C. § 407(a), which reads as follows:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The plaintiffs who have family members as their representative payees assert that the threat of legal action against their payees is "other legal process" prohibited by this provision. The plaintiffs who have Department institutions as their payees claim that the Department's simultaneous role as both creditor and payee puts it in the position of a preferred creditor,[2] a position disallowed by decisions of the Supreme

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[1]The Plaintiffs initially sought both injunctive and monetary relief. At oral argument, however, their attorney stated that they were now seeking only injunctive relief.

[2]Plaintiffs also claim this practice violates state trust law. We express no opinion on this issue, because the Eleventh Amendment deprives us of

Court. The District Court decided the case on cross-motions for summary judgment, and rejected the plaintiffs' contentions. This appeal followed.

As a preliminary matter, we note that § 407(a) applies to any creditor, including the state. Moreover, by virtue of the Supremacy Clause, the protection of § 407(a) must prevail over any conflicting actions authorized by state law. See, *e.g.*, *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). With these propositions in mind, we turn to an analysis of plaintiffs' claims.

We review the claims of the two groups of plaintiffs separately, for we believe the factual differences in their situations make a legal difference. We consider the claims of plaintiffs King and Baker -- who have family members as representative payees -- first. We hold that the term "other legal process" in § 407(a) includes the threat of legal process the Department used here. It is true that the

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jurisdiction to enforce state law by injunction against state officials or agencies. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Our decision is without prejudice to any claims plaintiffs may pursue in state court under state law.

Department never actually sued King's and Baker's payees, or withheld their state income tax refunds to get the social security benefits. The Department nevertheless told the payees it had the power to sue, or to have their refunds withheld, even though it admits it knew these actions were prohibited by § 407(a). What the state cannot do, it cannot threaten to do. *Moore v. Colautti*, 483 F. Supp. 357, 368 (E.D. Pa. 1979), *aff'd*, 633 F.2d 210 (3d Cir. 1980). We therefore reverse the judgment of the District Court with respect to plaintiffs King and Baker.

The claims raised by the remaining five plaintiffs – those with the Department as their representative payee – require a more extended analysis. They concede that federal regulations allow the Department to serve as their representative payee and permit it to use their benefits to pay for their care and treatment. 20 C.F.R. Secs. 404.2021(a)(3), 404.2040(a)-(b) (1991). And they do not challenge these regulations. They argue, however, that the Department's application to be appointed a representative payee is a form of "other legal process" prohibited by § 407(a). Moreover, they claim that the resulting arrangement puts the Department in the position of a preferred creditor contrary to the Supreme Court's decisions in *Philpott*, *supra*, and *Bennett v. Arkansas*, 485 U.S. 395 (1988) (per curiam).

We reject both contentions and therefore affirm as to this group

of plaintiffs.

We cannot agree with the plaintiffs that the Department's participation in the administrative proceeding to become a representative payee is the kind of coercive legal process envisioned by § 407(a). If we were to accept the plaintiffs' argument on this point, then no entity could apply to be a representative payee because the application would be barred by § 407(a) as "other legal process." We cannot believe Congress contemplated this result in enacting § 407(a), particularly when this result would be contrary to another provision of the Social Security Act: § 405(j), providing for the appointment of representative payees. Moreover, plaintiffs' admission that the Department is often the only party able to serve as a representative payee for beneficiaries in their position reveals the illogic of this argument.

Our conclusion that the Department's appointment as representative payee is not the result of "other legal process" compels us to reject plaintiffs' claim that the Department's actions are impermissible under Supreme Court precedent. Both *Philpott* and *Bennett*, upon which plaintiffs rely, are distinguishable. In *Bennett*, a case involving prisoners, the Court held that there was no implied exception to § 407(a) that would allow a state to attach social security benefits simply because the state provided care and maintenance.

Similarly, in *Philpott*, the Court held that § 407(a) prohibited suit by the State of New Jersey to reach an individual's social security benefits. In both cases, states attempted to reach the social security moneys in ways expressly prohibited by § 407(a). Here, however, as we have held, the Department did not impermissibly use "other legal process" to reach the plaintiffs' funds. Section 407(a) was not intended to outlaw a procedure expressly authorized by the Social Security Administration's own regulations.

Perhaps, as plaintiffs argue, the Department here is in a position akin to that of a preferred creditor. This situation, however, is not created by improper legal process or the Department's assertion of an implied exemption from § 407(a). *Cf. Philpott*, 409 U.S. at 416. Rather, the Department is in a preferred position by virtue of its appointment as a representative payee – an appointment allowed by federal regulations, which the plaintiffs do not claim are contrary to statute or invalid for any other reason.

Labelling the Department a preferred creditor is something of a misnomer at any rate. For one thing, under federal regulations, the patients receive notice of and may object to the Department's appointment as representative payee. 20 C.F.R. § 404.2030 (1991). Thus, the patients have, in effect, the ability to safeguard their own

benefits. And secondly, the Department provides a minimum of thirty dollars a month to the plaintiffs from their benefits for personal expenses. This practice is consistent with Social Security Administration guidelines and indicates that payment of the Department's monthly charges does not take precedence over the plaintiffs' other, personal expenses. Plaintiffs may ask for more money, and no such request has ever been turned down.

In sum, we affirm the District Court's grant of summary judgment to the Director of Mental Health with respect to those patients who have state institutions as their representative payees. We reverse, however, with respect to those patients who have family members as their representative payees. Accordingly, we remand the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

BEAM, Circuit Judge, concurring and dissenting.

In my view, *Bennett v. Arkansas*, 485 U.S. 395 (1988) (per curiam) controls the outcome of this case. I would, accordingly, reverse the judgment of the district court as to all plaintiffs and remand for further proceedings.

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-2652EMSL

THOMAS KING; JOHN WOLFIN; GREGORY CRYTES; JEREMIAH BAKER; JIMMY BAILEY ROGERS; CLAUDE SKILES; JOSEPH N. WHITFIELD,

Appellants,

v.

KEITH SCHAFER, DIRECTOR OF MENTAL HEALTH, STATE OF MISSOURI,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Appellants' petition for rehearing is also ordered denied.

The petition for rehearing filed by appellee has been considered by the court and is denied.

September 17, 1991

Order Entered at the Direction of the Court.

Clerk, U. S. Court of Appeals, Eighth Circuit.

§ 552.080 RSMo 1986. Court costs, examination fees, care and treatment, transportation, how paid. –

1. Notwithstanding any other provisions of law, the court in which the proceedings are pending shall, upon application and approval, order the payment of or tax as costs the following expenses and fees, which in each case shall be reasonable, and so found by the court:

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3. If a person is ordered held or hospitalized by the director of the department of mental health or in one of the facilities of the department of mental health pursuant to the following provisions, the liability for hospitalization shall be paid by the person, his estate or those responsible for his support in accordance with Chapter 630 RSMo.

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(2) Following acquittal because of lack of responsibility due to mental disease or defect under Section 552.030, and subsequent order of commitment to the director of the department of mental health under Section 552.040.

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§ 630.205 RSMo 1986. Patient or representative liable for costs of services rendered – parents not liable, when – denial of services for inability to pay prohibited, when – department subrogated to rights of patient, parent, or recipient, when. –

1. The person receiving services and the person's estate, spouse, parents, if the person is a minor, and any fiduciary or representative payee holding assets for the person or on the person's behalf are jointly and severally liable for the fees for services rendered to the person by a residential facility, day program or specialized service operated or funded by the department. The department shall not charge parents for services it renders to persons who are eighteen years of age or older and who are residents of this state. If any person, firm, corporation, or public or private agency is liable, either pursuant to contract or otherwise, to the parents or a recipient of services on account of personal injury to or disability or disease of the recipient of services,

the department is subrogated to the right of the parent or recipient to recover from that part of the award or settlement an amount equal to the amount expended by the service for services which are not otherwise recoverable from the parent or recipient. The acceptance of services from the department constitutes acknowledgment of subrogation rights by the department, and the department may take any and all action necessary to enforce the subrogation rights.

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§ 630.210 RSMo 1986. Charges for pay patients – each facility considered a separate unit – director to determine rules for means test and domicile verification – failure to pay, effect – exceptions, emergency treatment for transients. –

1. The director shall determine the maximum amount for services which shall be charged in each of the residential facilities, day programs or specialized services operated or funded by the department for full-time or part-time inpatient, resident or outpatient evaluation, care, treatment, habilitation, rehabilitation or other service rendered to persons affected by mental disorder, mental illness, mental retardation, developmental disability or drug or alcohol abuse. The maximum charge shall be related to the per capita inpatient cost or actual outpatient evaluation or other service costs of each facility, program or service, which may vary from one locality to another. The director shall promulgate rules setting forth a reasonable standard means test which shall be applied by all facilities, programs and services operated or funded by the department in determining the amount to be charged to persons receiving services. Any rule or portion of a rule promulgated may be suspended by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor. The department shall pay, out of funds appropriated to it for such purpose, all or part of the costs for the evaluation, care, treatment, habilitation, rehabilitation or room and board provided or arranged by the department for any patient, resident or client who is domiciled in Missouri and who is unable to pay fully for services.

2. The director shall apply the standard means test annually and may make application of the test upon his own initiative or upon request of

an interested party whenever evidence is offered tending to show that the current support status of any patient, resident or client is no longer proper. Any change of support status shall be retroactive to the date of application or request for review. If the persons responsible to pay under section 630.205 or 552.080, RSMo, refuse to cooperate in providing information necessary to properly apply the test or if retroactive benefits are paid on behalf of the patient, resident or client, the charges may be retroactive to a date prior to the date of application or request for review. The decision of the director in determining the amount to be charged for services to a patient, resident or client shall be final. Appeals from the determination may be taken to the circuit court of Cole County or the county where the person responsible for payment resides in the manner provided by Chapter 536, RSMo.

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